THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 261 OF 2007

Mrs.Vinita Lakhotia ... Petitioner.

V/s.

Union of India and others. ... Respondents.

Vikram Nankani with Madhur Baya
for the petitioner.

M.I.Sethna with P.S.Jetly; A.M.Sethna;
and N.R.Prajapati for the respondents.

CORAM: DR.S.RADHAKRISHNAN
AND V.C. DAGA, JJ.

DATED: 19th April 2006.

P.C. :

Rule, returnable forthwith.

Mr.Sethna appearing with Mr.Jetly waives service for the respondents.

Heard finally by consent of parties.

2. This petition is directed against the order dated 3rd November, 2006 (Exh.`T') passed by the

Customs, Excise and Service Tax Appellate Tribunal, Zonal Bench (“Tribunal” for short) in the Appeal No.C/116/06, whereby application seeking condonation of delay of about 180 days in filing appeal came to be rejected with further order rejecting application for stay as well as appeal holding it to be barred by time. Incidently, the petitioner has also challenged the order in original dated 6th June, 2003 (Exh.`I') and order in appeal dated 5th December, 2003 (Exh.`J') along with impugned order dated 3rd November, 2006.

The Factual Matrix :

3. The factual matrix reveals that the petitioner is a shareholder and director of M/s.Premium Intertrade Pvt. Ltd. (“Company” for short) and claims to be the absolute owner of the residential premises located at 6/2, `A' Wing, Loyds Garden, Prabhadevi, Mumbai- 400 025 (“said flat” for short) by virtue of sale-deed dated 28th February, 1997 obtained by her. The petitioner claims to be in the occupation of the said premises. It appear that Central Intelligence Unit of Air Cargo Complex, Sahar started investigations into the export of goods by the exporters and alleged that the duty drawback was obtained on the basis of forged shipping bills and other documents without any physical export of any goods outside India. The petitioner claims that she had no concern at all

with the export of the goods by the exporters and did not deal with and had no transactions either with the exporters or any other persons whosoever.

4. The Assistant Commissioner of Customs (Draw Back), Mumbai, respondent No.3 by order dated 27th December, 1997 confirmed the demand for drawback against M/s.Prime Agricom and M/s.Om Traders and further directed that the said flat be attached against the confirmed demand. The copy of the said order dated 27th December, 1997 was served on the petitioner on 29th December, 1997, although the petitioner was not party to the proceeding before respondent No.3. The petitioner appears to have filed writ petition in this Court being Writ Petition No.2068/1998 challenging the order and notice of attachment, however, it appears that vide order dated 25th January, 1999, the petitioner was permitted to withdraw said petition for availing alternate remedy, if any, under the provisions of the Customs Act, 1962 (“Act” for short).

5. The intervening litigations leading to filing of appeals, revisions before various authorities and writ petitions before this Court need no reference as they are not very much important for deciding the question of condonation of delay, as considered in this order.

6. Pursuant to the orders of this Court dated 6th April, 2002 in Writ Petition Nos.1394/2002 and

1395/2002, show-cause-notice dated 30th September, 2002 came to be issued to the Company and the petitioner calling upon them to show cause, why the said flats possessed by them should not be attached under the provisions of section 142 of the Act read with rules framed thereunder for recovery of the dues of the Customs Department. The petitioner filed her reply to the said show-cause-notice on 29th November, 2002. Similarly, the Company also filed its reply. The petitioner was granted personal hearing by respondent No.3 on 28th October, 2002. However, vide order dated 6th June, 2003, the contentions raised by the petitioner as well as by the Company were overruled by respondent No.3 and the order of attachment was clamped on two flats one alleged to have been owned by the Company and another by the petitioner.

7. Against the aforesaid order dated 6th June, 2003, the petitioner as well as the Company preferred two separate appeals before the Commissioner of Customs (Appeals), who was pleased to reject both the appeals by order dated 5th December, 2003. Against the said order, the petitioner and the Company both filed two separate revision applications under section 129DD of the Act.

8. The revision application filed by the Company came to be rejected by the revisional authority vide its order dated 25th July, 2005

holding that it had no jurisdiction to deal with the revision application.

9. However, no orders were passed on the revision application filed by the petitioner. With the result, the said revision application remained pending for consideration with the revisional authority.

10. The Company challenged the aforesaid order dated 25th July, 2005 in Writ Petition No.231/2006; wherein the petitioner was added as petitioner No.2 being a shareholder and director of the Company, not in her individual capacity.

11. This Court was pleased to passed the order dated 18th March, 2006 holding that an appeal from an order passed by the Commissioner of Customs (Appeals) lies before the Tribunal under section 129A of the Act, with the result, petitioners in Writ Petition No.231/2006 were permitted to file appeal before the Tribunal along with application for condonation of delay.

12. It appears that pursuant to the aforesaid liberty granted by this Court in the above writ petition, the Company preferred appeal before the Tribunal along with application for condonation of delay. The Tribunal after hearing the parties to the appeal appears to have condoned delay in filing appeal preferred by the Company.

13. It, however, appears that the petitioner sought legal advice, after the aforesaid order of this Court dated 18th March, 2006. She was advised by her advocate that the aforesaid order of the High Court being in Writ Petition No.231/2006 filed by the Company and that since her revision application was pending before the revisional authority it was not necessary for her to prefer appeal so long as the revision is pending. In other words, she was advised that she cannot avail two remedies at a time.

14. It appears that the revision filed by the petitioner came to be disposed of by the revisional authority vide its order dated 29th August, 2006 holding it to be not maintainable. The said order was received by the petitioner on 4th September, 2006. It appears that after receipt of the said order and in view of the law laid down by this Court in Writ Petition No.231/2006, she preferred appeal before the Tribunal along with application for condonation of delay.

15. The Tribunal has rejected her application for condonation of delay holding that the direction given by the High Court in Writ Petition No.231/2006 was binding on the petitioner and, therefore, she ought to have preferred appeal within a reasonable time. Since the petitioner did not file appeal, immediately, after the High Court order and waited

right up to October, 2006, the Tribunal held that no case was made out for condonation of delay. With the result, the application seeking for condonation of delay came to be rejected along with appeal holding it to be barred by limitation.

16. The aforesaid order of the Tribunal dated 3rd November, 2006 is a subject matter of challenge in this petition filed under Article 226 of the Constitution of India.

Submissions :

17. Mr.Nankani, learned counsel for the petitioner submits that it was reasonable on the part of the Legal Adviser to advise the petitioner that pending revision application preferred by her before the revisional authority, it was not open for her to file appeal. He further submits that the order passed by the Division Bench of this court dated 18th March, 2006 was passed in the writ petition filed by the Company; wherein the present petitioner was second petitioner not in her individual capacity but in the capacity of the shareholder and director of the Company. This order was not obtained by her in her individual capacity. As such it was not necessary to act upon the said order so long as her revision application was pending before the revisional authority. He submits that no litigant is permitted to resort to two

remedies at a time. In other words, according to him, a person cannot have both remedies at one time. The litigant has to choose one or the other, in view of the law laid down by the Apex Court in ***Premier Automobile Ltd.*** **v.** ***K.S.Wadke,*** 1975 SC 2238; wherein the Apex Court ruled-

> ..... Civil Courts will be the proper forum. But where the industrial dispute is for the purpose of enforcing any right, obligation or liability under the general law or the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the Civil Court. It is plain that he cannot have both. He has to choose the one or the other....."
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> (Emphasis supplied)

18. Mr.Nankani, alternatively, submits that assuming that the legal advise given was a wrong advise, however, the fact remains that the petitioner *bona fide* relied upon the legal advise given to her by her advocate and that wrong legal advise itself was a sufficient cause for condonation of delay.

19. Mr.Nankani thus, submits that, in fact, there was no delay in filing appeal. However, if there was any delay, it ought to have been condoned

by the Tribunal. He placed reliance on various judgments in support of his submission made in this behalf, viz. ***Sunderbai v. Collector of Belgaum***, AIR 1918 PC 1305; ***Shakuntala Devi Jain v. Kuntal Kumari***, AIR 1969 SC 575; ***P.R.Quenim v. M.K.Tandel,*** AIR 1974 SC 650; ***Wadhya Mal v. Prem Chand***, AIR 1982 SC 18; ***Nagindas Motilal v. NilajiMoroba Naik,*** AIR 1924 Bom 399; and ***Ram Nath Sao v. Gobardhan Sao***, AIR 2002 SC 1201 .

20. Per contra, Mr.Jetly, learned counsel for the respondents submits that the order of the Division Bench dated 18th March, 2006 passed in Writ Petition No.231/2006 was clear; wherein the present petitioner was also party, as such it was expected on her part to exercise her right of appeal within a reasonable time. Since the petitioner was negligent in filing appeal in spite of clear verdict of this Court as such this is not a case wherein this Court should exercise its discretionary writ jurisdiction. He further submits that the view taken by the Tribunal is a reasonable and possible view, therefore, this court should not interfere with the impugned order.

21. Mr.Jetly also tried to take us through the merits of the impugned order to impress upon us that the petitioner has played fraud on the respondents and, therefore, this Court should not exercise writ jurisdiction in her favour. In his submission, no

equity lies in favour of the petitioner to seek assistance of this Court, especially, under Article 226 of the Constitution of India. He, thus, prayed for dismissal of the writ petition.

Consideration :

22. Having heard learned counsel for the rival parties, it is not in dispute Writ Petition No.231/2006 was filed by the Company; wherein the petitioner was added as second petitioner but in the capacity of shareholder and director of the Company. The writ petition was never filed by her in her individual capacity. As a matter of fact, she could not have invoked writ jurisdiction of this court in her individual capacity since her revision application was very much pending before the revisional authority. The order passed by the Division Bench in Writ Petition No.231/2006 was in the case of the Company and not in the case of the petitioner, as such the petitioner in her individual capacity was not bound by the said order.

23. It is not in dispute that the revision application filed by the petitioner before the revisional authority was very much pending when Writ Petition No.231/2006 was decided by this Court.

24. The revisional authority rejected petitioner's revision application vide order dated

29th August, 2006. The said order was received by the petitioner on 4th September, 2006. Upon receipt of the said order dated 29th August, 2006, petitioner preferred appeal before the Tribunal on 29th September, 2006 along with application for condonation of delay as per the law laid down by this Court in Writ Petitin No.231/2006. The legal position was not clear till this petition was decided by this Court. As a matter of fact, there was no delay in preferring the appeal since the order was received by the petitioner on 4th September, 2006. The appeal was filed on 29th September, 2006. The appeal was well within limitation. The application for condonation of delay was not necessary. It appears that the application for condonation of delay was preferred under misconception. In fact, it was not necessary.

25. Alternatively, assuming for the sake of argument that the order of the division Bench dated 16th March, 2006 was binding on the petitioner, even then, she could not have preferred appeal till decision on her revision application. As soon as her revision application was disposed of by the revisional authority, appeal was preferred by her before the Tribunal. In this view of the matter, the delay, if any, was sufficiently explained by her and, therefore, at any rate, the Tribunal ought to have exercised discretion in favour of the petitioner by condoning delay in preferring appeal.

26. In the result, the impugned order is quashed and set aside. Petition is allowed. We hold that the appeal was well within time. The appeal is restored to the file of the Tribunal with direction to decide the appeal along with application for stay on its own merits in accordance with law. All rival contentions are kept open. Rule is made absolute in terms of this order.

(V.C.DAGA,J.) **(DR.S.RADHAKRISHNAN,J.)**